SHAMSULBAHRI SHAFFIE A

v.

TITAN PETCHEM (M) SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU B
MOHD ZAWAWI SALLEH JC
[CIVIL SUIT NO: MT(3) 22-737-2007]
7 SEPTEMBER 2009

CIVIL PROCEDURE: *Action - Wrongful dismissal - Action taken by plaintiff by way of writ to challenge purported dismissal - Whether court proper forum - Whether damages the only remedy available - Whether plaintiff's failure to include prayer for damages rendered suit struck out* C

The plaintiff in this writ of summons and statement of claim prayed for, *inter alia*, a declaration that his purported dismissal by the defendant was wrongful, and that he was entitled to reinstatement. The defendant raised a preliminary objection ('PO') as to whether the action was rightly taken by the plaintiff by way of writ herein to challenge his purported dismissal as opposed to by way of representations to the Industrial Court under s. 20 of the Industrial Relations Act 1967. D E

Held (allowing the PO and striking out the plaintiff's writ of summons and statement of claim): F

(1) Pursuant to the principles enunciated in *Haji Ali Haji Othman v. Telekom Malaysia Berhad* and *Zaiton Hamzah v. Telekom Malaysia Berhad* which followed the decision in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors*, the plaintiff was not in any way restricted to bring an action in a civil suit. However, such a claim was restricted to damages as provided for under the common law. In the present case, the plaintiff did not include a prayer for damages. Without a prayer for damages, it was not possible to order damages in the event a finding of wrongful dismissal was made. It was also not possible to order reinstatement, the only remedy being damages. (para 11) G H

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Case(s) referred to:

Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1980] 1 LNS 156 ***(refd)***

Haji Ali Haji Othman v. Telekom Malaysia Berhad [1997] 2 CLJ 710 HC ***(refd)***

Manggal v. Government of Sarawak & Anor [1970] 2 MLJ 41 ***(refd)***

Metal Industry Employees Union v. Registrar of Trade Unions & Ors [1975] 1 LNS 104 FC ***(refd)***

Pasmore v. The Oswaldtwistle Urban District Council [1898] AC 387 ***(refd)***

RCA Sdn Bhd v. Pekerja-Pekerja RCA Sdn Bhd & Ors [1991] 1 CLJ 19; [1991] 1 CLJ (Rep) 401 ***(refd)***

Wilkinson v. Barking Corp [1948] 1 KB 721 ***(refd)***

Zaiton Hamzah v. Telekom Malaysia Berhad [2001] 1 LNS 388 HC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(3), (4)

For the plaintiff - Norman Fernandez; M/s C Sukumaran & Co
For the defendant - Ten Yee Phor; M/s Ten & Colin

Reported by Usha Thiagarajah

JUDGMENT

Mohd Zawawi Salleh JC:

Preliminary Objection

[1] In this instant case, learned counsel for the defendant had raised a preliminary objection as to whether the action was rightly taken by the plaintiff by way of writ to challenge his purported dismissal. So, the issue to be determined is simply this: whether this court is the proper forum to hear the claim of unfair dismissal of the plaintiff and whether he is entitled to reinstatement of his previous job and to be paid all arrears of salary, etc, as opposed to having his dismissal adjudicated by the Industrial Court as provided for under s. 20 of the Industrial Relations Act 1967 ("the Act").

The Background Of The Case

[2] The following are the cause papers filed herein:

2.1 Writ of summons dated 31 October 2007;

2.2 Statement of claim dated 2 July 2007;

2.3 Memorandum of appearance dated 9 April 2008;

2.4 Statement of defence dated 30 June 2008; and

2.5 Notice to Attend Pre-Trial Case Management dated 15 June 2009 ("the said notice").

[3] For a better appreciation of the issue, regard must be had to the background of the case. I will now narrate it briefly:

3.1 The plaintiff commenced his employment with the defendant on 14 January 2002 as Security Superintendant *vide* a letter of appointment dated 3 December 2001;

3.2 Sometime in the end of February 2005, the defendant had received a complaint that the plaintiff had committed very serious acts of misconduct;

3.3 The defendant had carried out an investigation to look into the alleged acts of misconduct;

3.4 By a letter dated 5 March 2005, the defendant issued a show cause letter to the plaintiff wherein the plaintiff was required to show cause to two (2) alleged acts of misconduct as follows:

> **Allegation 1**
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> That on 24 February 2005 in between 8.30 am - 9.00 am, you had failed to submit visitor notification form to security guard at Tanjung Langsat main gate to issue visitor pass to Mr. Ten Yee Phor despite being informed by Abdul Jamal *via* email on 23 February 2005.
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> **Allegation 2**
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> That on 21 February 2005 between 9.30 am - 12.30 pm, you had allowed foreign workers supplied by Archipelago to perform housekeeping job in Titan Tanjung Langsat plant despite being informed by the Security Officer (En. Khilmi) that the work permits of the said foreign workers had expired.

3.5 The plaintiff had, by a letter dated 10 March 2005, replied to the defendant's show cause letter;

3.6 Dissatisfied with the plaintiff's reply, the defendant had, by its letter dated 29 April 2005, suspended the plaintiff from work effective from 30 April 2005 until further notice pending investigation into the alleged acts of misconduct;

3.7 On the same day, the defendant had, by a letter dated 29 April 2005, issued a notice of domestic inquiry to the plaintiff wherein the plaintiff was required to attend a domestic inquiry to answer to five (5) alleged acts of misconduct, the particulars are as follows:

Charge 1

That you, being the Security Superintendent in charge of Pasir Gudang plant had failed to visit the PC/PE guard post as required of you since 05 July 2004. By your action, you have committed serious dereliction of duties on your part thereby tantamounting to an act of serious misconduct.

Charge 2

That you, being the Security Superintendent in charge of Pasir Gudang plant had failed to visit the PP guard post as required of you since 06 July 2004. By your action, you have committed serious dereliction of duties on your part thereby tantamounting to an act of serious misconduct.

Charge 3

That you, being the Security Superintendent in charge of Tanjung Langsat plant since 28 January 2005 had failed to visit the guard post No. 1 and No. 2 (except on 09 February 2005) and guard No. 3 (except on 16 February 2005) as required of you. By your action, you have committed serious dereliction of duties on your part thereby tantamounting to an act of serious misconduct.

Charge 4

That you, being the Security Superintendent in charge of Tanjung Langsat plant despite specific instruction given to you to weed out illegal workers from working in the plant, had personally or through the guard(s) reporting to you allowed a foreign worker by the name Habibur Rahman supplied by Archipelago without valid work permit to perform housekeeping job. By your action, you have committed serious dereliction of duties on your part thereby tantamounting to an act of serious misconduct.

Charge 5

That you, being the Security Superintendent in charge of Tanjung Langsat plant had failed to properly brief or train your guards to thoroughly check and weed out illegal workers from working in the plant as instructed which had resulted in eight (8) foreign workers supplied by Kargo Jaya with expired work permit working in the plant on 21 February 2005. By your action, you have committed serious dereliction of duties on your part thereby tantamounting to an act of serious misconduct.

3.8 The domestic inquiry was held against the plaintiff on 9 May 2005, 10 May 2005 and 11 May 2005 as scheduled. During the proceedings, the plaintiff was given full opportunity to exculpate himself. The plaintiff was allowed to bring his witnesses and cross-examine the defendant's witnesses. It would appear that the domestic inquiry was carried out in compliance with fair labour practice and in accordance with the principle of natural justice.

3.9 The panel members were Mr. Leong Khee Seng (the Chairman), En. Kamarudin Kasim and Mr. Sidney Saw Chai Hin and the minutes Secretary was Cik Norly Che Noor. The defendant had called four (4) witnesses and the plaintiff had called seven (7) witnesses to give evidence during the domestic inquiry.

3.10 After evaluating the evidence and testimonies of the witnesses in the domestic inquiry, the panel members found that the plaintiff guilty of Charge 1, Charge 2, Charge 4 and Charge 5.

3.11 The defendant concurred with the findings of the panel members and had *vide* its letter dated 25 May 2005, informed the plaintiff of the panel members findings and its concurrence with the finding. Accordingly, the plaintiff was dismissed from the services of the defendant with effect from 26 May 2005.

The Plaintiff's Contention

[4] Learned counsel for the plaintiff submitted that s. 20 of the Act provides that when a workman considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing within sixty (60) days from the date

of the dismissal to the Director General to be reinstated in his former employment. The Federal Court in the case of *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] 1 LNS 156 held that since s. 20 of the Act is only an alternative remedy it does not operate to restrict and require the plaintiff to proceed only under s. 20. Since there was no obligation for the plaintiff to proceed only under s. 20 of the Act, the plaintiff is at liberty to file a civil suit against the defendant.

[5] Learned counsel for the plaintiff posits that the decision in *Fung Keong Rubber (supra)* does not prohibit a dismissed employee from going to High Court to seek redress. There is also no exclusion clause in both the Act and the Employment Act 1944 to deprive the plaintiff from seeking redress in High Court. Learned counsel further submits that s. 20 is an alternative statutory remedy to a common law action. It is an entirely voluntary process offering to a dismissed worker a relatively inexpensive and expeditious method of seeking civil redress. A worker may well elect to ignore that provision and seek redress at common law for wrongful dismissal. The right to seek a traditional remedy under common law remains unaffected until an award is made by the Industrial Court upon a reference by the Minister. That right is taken away by s. 20(4) which states that such "award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal". It further suggests that until an award is handed down, a worker may seek redress under the common law as, for example, where he is dissatisfied with the manner in which his representation is handled by the Director General or where the Minister decides not to refer the representation to the Industrial Court. It would seem that the invocation of s. 20 by itself is no bar to an action at common law until an award is made by the Industrial Court. So, the action was rightly taken by the plaintiff by way of writ to challenge his dismissal.

Findings Of Court

[6] With respect, in the circumstances of this case, this court disagrees. The Federal Court had in the case of *Manggal v. Government of Sarawak & Anor* [1970] 2 MLJ 41 held that:

> It is well settled law that the Court will not make a declaratory judgment where an adequate alternative remedy is available (see *Halsbury's Laws of England*, 3rd ed. Vol 22, page 749, para 1611). To quote but a few authorities in support of that proposition, Lord Herschell said in *Barraclough v. Brown*: [1897] AC 615, 620.

> It was argued for the appellant that, even if not entitled to recover the expenses by action in the High Court, he was, at all events, entitled to come to that Court for declaration that on the true interpretation of the statute he had a right to recover them. It might be enough to say that no such case was made by the appellant's claim. But, apart from this, I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior Court he can come first to the High Court to have his right to recover - the very matter relegated to the inferior court-determined. Such a proposition was not supported by authority, and is, I think, unsound in principle.

In *Pasmore v. The Oswaldtwistle Urban District Council* [1898] AC 387, 394 Earl of Halsbury LC said:

> … The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.

In the more recent case of *Wilkinson v. Barking Corp* [1948] 1 KB 721, 724 Asquith LJ said:

> … It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others.

[7] The proposition in *Mangal (supra)* has been cited with approval by the Federal court in the case of *Metal Industry Employees Union v. Registrar of Trade Unions & Ors* [1975] 1 LNS 104 and the Supreme Court in the case of *RCA Sdn Bhd v. Pekerja-Pekerja RCA Sdn Bhd & Ors* [1991] 1 CLJ 19; [1991] 1 CLJ (Rep) 401.

[8] In the case of *Haji Ali Haji Othman v. Telekom Malaysia Berhad* [1997] 2 CLJ 710 where the defendant had raised a preliminary objection as to whether the action was rightly taken by the plaintiff by way of writ to challenge his purported dismissal. The defendant contended that the plaintiff in that case could not do so as he had failed to get his case referred to the Industrial Court by the Minister under s. 20(3) of IRA 1967. The right course of action that should be taken by the plaintiff would be to apply for the Minister's decision to be quashed by way of orders of *certiorari* and *mandamus*. Haidar Mohd. Noor, J in delivering his decision distinguished from the above mentioned decisions where his Lordship held that:

A The issue here is whether having failed to file an action for *certiorari* and *mandamus* in respect of the Minister's decision, is the Plaintiff barred from filing this action seeking for declaratory orders. It has been said that the two remedies are not mutually exclusive (see *Petaling Tin Bhd v. Lee Kian Chan* [1994] 1 MLJ quoting with approval at p. 675, the obiter of Lord Goddard in *Pyx Granite Co.* B *v. Ministry of Housing and Local Government* [1960] AC 260; [1959] 3 All ER 1; [1959] 3 WCR 346). The short answer to Encik Sowaran Singh's preliminary objection can be found in *Minister Of Labour, Malaysia v. Chan Meng Yuen & Anor Appeal* [1992] 1 CLJ (Rep) 216 where at pp. 342/343 the Supreme Court in refusing to C interfere with the Minister's refusal to refer the representation made to the Industrial Court said:

> If the respondent is still aggrieved from the decision, it is open to him to **file a suit in the Civil Court for damages for wrongful dismissal.** This is clearly contemplated by D s. 20(4) of the Act. (emphasis added)

The present suit is, *inter alia*, for damages for wrongful dismissal. In the circumstances, I overruled the preliminary objection of the Defendant.

E **[9]** It is important to note that the instant case is very different from the *Haji Ali* case wherein the plaintiff in *Haji Ali* had filed in a motion against the defendant claiming for:

i) A declaration that the purported dismissal of the plaintiff by the F defendant was null, bad in law and ineffective;

ii) A declaration that the plaintiff was and still is and continues to be an employee of the defendant;

iii) That the plaintiff is entitled to immediate reinstatement at his G previous job and to be paid all arrears of salary etc. as well as to all perks and privileges arising out of such employment; or

iv) **Damages *in lieu* thereof;**

H v) Such further or other relief;

vi) Costs of this action;

vii) Interests. (emphasis added)

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Whereas, the plaintiff in the instant case has filed this writ summon claiming for, *inter alia*:

a) A declaration that the purported dismissal of the plaintiff by the Defendant was null, bad in law and ineffective;

b) That the plaintiff is entitled to reinstatement at his previous job and to be paid all arrears of salary etc. as well as to all perks and privileges arising out of such employment;

c) Cost; and

d) any further or other reliefs this Honourable Court deems fit and reasonable.

What is conspicuously missing in the plaintiff's prayers is the damages *in lieu* of reinstatement.

[10] In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract eg, a summary dismissal where the workman has not committed misconduct. KC Vohrah J had, in the case of *Zaiton Hamzah v. Telekom Malaysia Berhad* [2001] 1 LNS 388, where his Lordship followed the proposition in *Fung Keong Rubber (supra)*, held that:

> There is a prayer for the Senior Assistant Registrar to assess the damages due and payable to the Defendant for the wrongful dismissal. This is a correct prayer as at common law it is not possible for a wrongfully dismissed workman to obtain an order for re-instatement because an award of damages is the only remedy known under common law. This is made clear in the words of Raja Azlan Shah CJ (Malaya) (as Highness then was) in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] 1 LNS 156; [1981] MLJ 238 at p. 239:
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> > In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, eg, a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given. He may even get less than the wages for the period of notice if it can be proved that he could obtain similar job

A immediately or during the notice period with some other employer. He cannot sue for wounded feelings or loss of reputation caused by a summary dismissal, where for instance he was dismissed on a groundless charge of dishonesty. At common law it is not possible for a wrongfully dismissed
B workman to obtain an order for reinstatement because the common law knew only one remedy, *viz* an award of damages. Further, the courts will not normally "reinstate" a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid: see *Vine v. National Dock Labour Board* [1957] AC 488, 500, 507, *Francis v.*
C *Municipal Councilors of Kuala Lumpur* [1962] 1 LNS 40; [1962] 1 WLR 1411; [1962] MLJ 407. At the most it will declare that it was wrongful.

In the circumstances there shall be a declaration that the purported termination of service of the Defendant is wrongful and an order that the
D *SAR assess the damages due and payable for the wrongful dismissal.* (emphasis added)

[11] The court is of the considered opinion that pursuant to the principles enunciated in the *Haji Ali* case *(supra)* and *Zaiton* case
E *(supra)*, which followed the decision in *Fung Keong Rubber (supra)*, the plaintiff in the instant case is not in anyway restricted to bring action in civil suit. However, such a claim in the civil suit is restricted to damages as provided for under the common law. In the instant case, the plaintiff had not at any time prayed for damages
F which is the only remedy under the common law. It is therefore different from the *Haji Ali* case *(supra)* and *Zaiton* case *(supra)*. Without prayer for damages, it is not possible for this court to order damages in the event this court finds the dismissal wrongful. It is not possible for this court to order reinstatement for wrongfully
G dismissed employee as claimed by plaintiff in this instant as the only remedy is damages.

Conclusion

[12] Based on the aforesaid, it is the finding of this court that
H declaration that the purported dismissal of the defendant is misconceived, bad in law and ineffective and that he is entitled to reinstatement to his previous job and to be paid all arrears of salary etc., as well as to all perks and privileges arising out of such employment, cost and such further or other relief. If the claim for
I reinstatement is allowed by this court, it would then defeat the very basic principle of common law that this court could not and would not grant specific performance of contracts of service.

[13] In the circumstances, the preliminary objection raised by the defendant is sustained. Accordingly, I strike out the writ of summons and the statement of claim filed by the plaintiff as this court is not the proper forum to hear this matter. There is no order as to costs.